Supreme Court, U.S.
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No. 97-1407

In The

Supreme Court of the United States

October Term, 1997

THOMAS L. FALKENBERRY,

Petitioner,

vs.

JOYCE K. TAYLOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLAS H. PIKE
118 East Trinity Place
Decatur, Georgia 30030
(404) 479-4400

FRED L. CAVALLI
118 East Trinity Place
Decatur, Georgia 30030
(404) 479-4400

Attorneys for Respondent

146103

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTIONS PRESENTED

I. Where Petitioner failed to exercise his right to seek review from the lower State court's child custody order in the State's appellate courts, is the Petitioner precluded from seeking relief in a federal District Court?

II. Is there an exception to the "Rooker-Feldman Doctrine" which would permit Petitioner to seek relief in federal District Court from a self-executing child custody modification provision where Petitioner could have availed himself of the state courts for the relief he now seeks in federal court?

III. Where Petitioner does not seek a writ of certiorari from that portion of the District Court's holding that the Respondent is not a state actor, is Petitioner restricted from maintaining a § 1983 action seeking injunctive and other relief?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Additional Relevant Statutory Provisions 1

Statement of the Case 3

A. Course of the Proceedings 3

B. Statement of Facts 4

C. Petitioner's Misstatement of Facts 7

Reasons for Denying the Writ 8

I. Petitioner Is Barred From Petitioning For A Writ Or Certiorari As He Has Failed To Even Attempt To Seek Review By The Highest Court In The State Of Georgia. 8

II. The Federal District Court Correctly Decided That It Did Not Have Jurisdiction To Review The Lower State Court Decision Establishing Child Custody Rights. 9

III. Assuming For Purposes Of Argument That This Court Found Merit In Petitioner's Position And Remanded To The District Court, Petitioner Cannot Maintain A § 1983 Action Against Respondent As She Is Not A State Actor. 16

Conclusion 20

Contents

TABLE OF CITATIONS

Page

Cases Cited:

Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) 16

Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga 1989), *aff'd in part and rev'd in part on other grounds*, 909 F.2d 463 (11th Cir. 1990) 19

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 9

Bradley v. Bradley, 232 Ga. 717, 208 S.E. 2d 817 (1974) 13, 14

Carr v. Carr, 263 Ga. 451, 435 S.E. 2d 44 (1993) ... 13

Collins v. Walden, 613 F. Supp. 1306 (N.D. Ga. 1985) 15

District of Columbia v Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) 9, 14

Hathcock v. Hathcock, 232 Ga. 719, 208 S.E. 2d 819 (1974) 14

Ingram v. Hayes, 866 F.2d 368 (11th Cir. 1988) 10

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) 16

Contents

	Page
Mitchum v. Foster, 407 U.S. 225 (1972)	10
M.L.B. v. S.L.J., __ U.S. __, 117 S. Ct. 555 (1996)	13
Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniel v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)	17
Pennzoil v. Texaco, 481 U.S. 1 (1987)	10, 15, 17
Powell v. Powell, 840 F.2d 464 (11th Cir. 1996)	9, 15, 16
Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989)	11, 12
Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923)	9
Steel Company v. Citizens for a Better Environment, __ U.S. __, 118 S .Ct. 1003 (1998)	16, 17
Street v. New York, NY, 394 U.S. 1354 (1969)	8
Thomas L. Falkenberry v. Joyce K. Taylor, Civil Action File No. 4:95-CV-151-HLM, (N.D. Ga., Rome Division, Dec. 10, 1996)	3

Statutes Cited:

28 U.S.C. § 1257	8
28 U.S.C. § 1738	16

Contents

	Page
42 U.S.C. § 1983	i, 3, 6, 10, 11, 12, 16, 17
O.C.G.A. § 5-6-35	1, 14
O.C.G.A. § 9-11-60	14
O.C.G.A. § 19-9-1	1, 11, 12
O.C.G.A. § 19-9-3	2, 11, 12
United States Constitution Cited:	
Fourteenth Amendment	6
Other Authority Cited:	
Ga. Const. 1983, Art. VI, § VI, ¶ III	14

ADDITIONAL RELEVANT STATUTORY PROVISIONS

O.C.G.A. § 5-6-35

> Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal.
>
> (a) Appeals in the following cases shall be taken as provided in this Code section:
>
> (2) Appeals from judgments or orders in divorce, alimony, child custody, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders;
>
> * * *
>
> (d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of . . .

O.C.G.A. § 19-9-1

> (b) In any case in which a judgment awarding the custody of a minor has been entered, on the motion of any party or on the motion of the court,

that portion of the judgment effecting visitation rights between the parties and their minor children may be subject to review and modification or alteration without the necessity of any showing of a change in any material conditions and circumstances of either party or the minor, provided that the review and modification or alteration shall not be had more often than once in each two-year period following the date of entry of the judgment. However, this subsection shall not limit or restrict the power of the court to enter a judgment relating to the custody of a minor in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the minor.

O.C.G.A. § 19-9-3

(b) In any case in which a judgment awarding the custody of a minor has been entered, on the motion of any party or on the motion of the court, that portion of the judgment effecting visitation rights between the parties and their minor children may be subject to review and modification or alteration without the necessity of any showing of a change in any material conditions and circumstances of either party or the minor, provided that the review and modification or alteration shall not be had more often than once in each two-year period following the date of entry of the judgment. However, this subsection shall not limit or restrict the power of the court to enter a judgment relating to the custody of a minor in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the minor.

STATEMENT OF THE CASE

A. Course of the Proceedings

This appeal is from the Eleventh Circuit Court of Appeal's affirming the Northern District Court of Georgia's grant of Respondent's Motion for Summary Judgment and denial of Petitioner's Motion for Summary Judgment in the underlying action; to wit: *Thomas L. Falkenberry v. Joyce K. Taylor*, Civil Action File No. 4:95-CV-151-HLM, (N.D. Ga., Rome Division, Dec. 10, 1996). Petitioner had instituted a 42 U.S.C. § 1983 action seeking injunctive relief. More specifically, Petitioner sought to have the District Court declare as unconstitutional a certain child custody provision of a Final Judgment and Decree of divorce entered in the Superior Court of Gwinnett County in the State of Georgia. Both parties submitted motions for summary judgment to the District Court, whereupon the District Court denied Petitioner's Motion for Summary Judgment and granted Respondent's Motion for Summary Judgment. Petitioner's appeal to the Eleventh Circuit Court of Appeals ensued.

The appeal to the Eleventh Circuit Court of Appeals sought reversal of the granting of Respondent's Motion for Summary Judgment. On November 27, 1997, simultaneously with the granting of Respondent's Motion to Strike portions of Petitioner's brief and addendum, the granting of Petitioner's motion to supplement his records excerpts and the denial of Petitioner's Motion to strike Respondent's brief and to bar her from oral argument, the Eleventh Circuit affirmed without opinion. The present Petition for Writ of Certiorari ensued.

At issue is a specific provision of a custody order from which Petitioner did not seek review before the State's highest court (or, for that matter, any other Court).[1]

1. Arguably, the underlying § 1983 action was an attempt to appeal the Custody Order.

B. Statement of Facts

The parties have one child; to wit: Zachary L. Falkenberry, born October 20, 1988. Respondent instituted a divorce action in the Superior Court of Gwinnett County in 1992. Custody of Zachary was an issue and the Superior Court of Gwinnett County transferred the custody and visitation issues to the Juvenile Court of Gwinnett County for determination.

Both parties engaged in discovery and, on August 23, 1993, after notice, a hearing was held in the Juvenile Court of Gwinnett County. Both parties were represented by counsel. Both parties presented the testimony of witnesses and documents in support of their respective positions on the custody issue. On September 7, 1993, the Juvenile Court of Gwinnett County entered its Custody Order.

Pursuant to the terms of said Custody Order, the parties were awarded joint legal and physical custody of Zachary. Petitioner was awarded primary joint physical custody of Zachary and the Juvenile Court set forth a secondary joint physical custodial visitation schedule for Respondent in the event the parties were unable to otherwise agree. At the time of the hearing, both parties lived within three blocks of each other in Snellville, Georgia and Petitioner testified at the hearing that he had no intention of moving away. The custody order set forth alternate weekend secondary joint custodial visitation for Respondent along with one overnight secondary custodial visitation during each week. The Juvenile Court also provided for holiday and extended visitation.

The Custody Order also provided as follows:

> In the event that either the Wife [Respondent] or the Husband [Petitioner] moves from the metropolitan

> Atlanta area, i.e., Metropolitan Statistical Area as defined by the Office of Management and Budget (OMB), the primary residence of the Child shall be with the non-moving parent. The parent who relocated shall have the same visitation rights with the Child as now set forth for the Wife [Respondent] and the party receiving primary physical custody shall have the same rights as set forth for the Husband [Petitioner].

It is this provision which Petitioner sought to have the District Court declare unenforceable.

All other issues, including child support, remained to be determined by the Gwinnett County Superior Court. On December 31, 1993, the parties executed an Agreement resolving all remaining issues in the divorce action. In the Agreement, the parties expressly incorporated the Custody Order of September 7, 1993:

> The issue of custody has been transferred to the Juvenile court of Gwinnett County, with a Custody Order entered herein on September 7, 1993, Juvenile Court Docket Number 93-0590-2, and the parties hereto are ordered to abide by and comply with said Juvenile Court Order, except that Paragraph 1 shall be amended to reflect the following:
>
> > Subparagraph (k) [which provided the Respondent with one overnight secondary custodial visitation per each week] shall be amended to reflect the hours of visitation to begin at 4:30 p.m. until 8:00 p.m.

The Settlement Agreement was incorporated into the Gwinnett County Superior Court's Final Judgment and Decree of January 3, 1994. At no time did Petitioner move to have either the Custody Order or the Final Judgment and Decree reconsidered, vacated, set aside or reheard. At no time did Petitioner move for a new trial in the Juvenile Court. At no time did Petitioner request from either the Juvenile Court or the Superior Court a Certificate of Immediate Review. At no time did Petitioner apply to the Georgia Supreme Court or the Georgia Court of Appeals for a discretionary review. At no time did Petitioner file a Notice of Appeal; nor has Petitioner, until now, petitioned for a Writ of Certiorari from the United States Supreme Court. In fact, until the § 1983 action was filed, Petitioner did not raise any objections or put forth any arguments as to the constitutionality of the visitation provision contained in ¶ 1(n) of the Custody Order.

On or about August 1, 1994, Petitioner moved to Cartersville, Georgia with Zachary. Cartersville is within the Metropolitan Atlanta Statistical Area, but is sixty-five miles from Respondent's place of residence. Respondent must now travel over one hundred and twenty miles to exercise visitation; thereby rendering her ability to exercise her weekday visitation an impossibility due to her work schedule.

Petitioner states in the underlying action that he intends to move to Chattanooga, Tennessee so that he could work for his father. This is outside the Metropolitan Atlanta Statistical Area and would result in Respondent becoming the primary joint physical custodian and Petitioner becoming the secondary joint physical custodian.

Petitioner sought to have ¶ 1(n) of the Custody Order declared invalid, claiming that this provision violates his Fourteenth Amendment Due Process rights and his right to

interstate travel. Petitioner has not petitioned a State court of competent jurisdiction to modify the Custody Order.

C. Petitioner's Misstatement of Facts

The Petitioner alleges for the first time that:

> Ms. Taylor, who lives in Snellville, Georgia, would have just as much time with her son as she enjoys under the current plan. Furthermore, as Mr. Falkenberry has agreed to handle all of the transportation, she would not be inconvenienced.

Writ, at 9. Petitioner also states, without any support in the record, that Respondent's contact with the child would not be diminished by Petitioner moving to Chattanooga, Tennessee. Writ, at 14. There is nothing in the record to reflect that any such agreement has ever been reached, let alone broached. In fact, no such agreement exists. Additionally, the visitation provisions of the Custody Order provides that Zachary will have weekday overnight visitation with Respondent which, due to Petitioner's relocation to Cartersville, Georgia, Zachary has not been able to enjoy due to the already great distances involved. The record does reflect that Zachary's visitation with his mother has already been curtailed due to Petitioner's moving over sixty miles away from Respondent and that Petitioner has not cooperated with transportation as of the filing of his Petition for Writ of Certiorari to this Court.

Petitioner also asserts that he will lose custody without any further judicial proceedings if he is to move to Chattanooga, Tennessee. This misrepresents the fact that Petitioner has continually had the opportunity to petition a State court of competent jurisdiction for a modification of custody.

REASONS FOR DENYING THE WRIT

I.

PETITIONER IS BARRED FROM PETITIONING FOR A WRIT OR CERTIORARI AS HE HAS FAILED TO EVEN ATTEMPT TO SEEK REVIEW BY THE HIGHEST COURT IN THE STATE OF GEORGIA.

There has been no final judgment or decree rendered by the Georgia Supreme Court, the highest court in the State of Georgia. The opinion from which Petitioner appeals is from a lower Georgia court's custody order. It is undisputed that Petitioner failed to seek review from any of the Georgia State courts. Thus, a writ of certiorari cannot be granted. 28 U.S.C. § 1257.

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . .

Id.

The District Court recognized this fact:

> The Custody Order became a final state court order when [Petitioner] failed to file an appeal of the order within 30 days of its entry. *See* O.C.G.A. § 5-6-35(d) (requiring appeals of divorce or child custody orders to be filed with the Clerk of the Georgia Supreme Court within 30 days of entry of order).

Thus, at the threshold, Petitioner is barred from obtaining a writ of certiorari. *Street v. New York, NY*, 394 U.S. 1354 (1969)

(holding that the United States Supreme Court lacks the power to consider the constitutionality of a state Court's decision unless that issue has been first decided by the State's highest court); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (holding that, when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.").

II.

THE FEDERAL DISTRICT COURT CORRECTLY DECIDED THAT IT DID NOT HAVE JURISDICTION TO REVIEW THE LOWER STATE COURT DECISION ESTABLISHING CHILD CUSTODY RIGHTS.

The "Rooker-Feldman Doctrine" establishes the general rule that federal district courts do not have jurisdiction to entertain direct challenges to state court decisions. *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923); *District of Columbia v Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Powell v. Powell*, 840 F.2d 464, 466 (11th Cir. 1996).

> The doctrine applies not only to claims actually raised in the state court, but also to claims that were not raised in the state court but are "inextricably intertwined" with the state court's judgment.

Feldman, 460 U.S. 462, 482 (1983). "This rule also applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process . . . rights." *Feldman*, 460 U.S. at 485 (1983).

While limited exceptions have been established by this Court, the present Writ does not present a factual predicate for interfering with a lower State court's un-appealed, measured and considered domestic relations order. Petitioner's reliance on *Pennzoil v. Texaco*, 481 U.S. 1 (1987), and *Mitchum v. Foster*, 407 U.S. 225 (1972) for an inroad into the "Rooker-Feldman Doctrine" is misplaced. In *Pennzoil*, the "Rooker-Feldman Doctrine" is discussed by the majority in the context of the history of the action in the lower federal courts. In *Mitchum*, this Court determined that § 1983 falls within the "expressly authorized" exception to the anti-injunction statute. *Mitchum*, 407 U.S. at 242. However, this Court went on to reaffirm that this Court did not "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding". *Id.*, at 243. In both *Pennzoil* and *Mitchum*, appeals in state courts were pending in the relative State courts. Here, the State court action is over and Petitioner failed to appeal. Thus, concerns of injury to the Petitioner pending the outcome of an appeal in a State court simply do not exist, as in *Pennzoil* and *Mitchum*.

The "Rooker-Feldman Doctrine" has been recognized as being especially applicable where child custody issues are involved:

> The federal judiciary has traditionally abstained from deciding cases concerning domestic relations . . . . As a result, federal courts generally dismiss cases involving divorce and alimony, child custody, visitations [sic.] rights, establishment of paternity, child support, and enforcement of separation or divorce decrees still subject to state court modification.

Ingram v. Hayes, 866 F.2d 368 (11th Cir. 1988).

The policy supporting the domestic relations exception was concisely stated in *Rogers v. Janzen*, 891 F.2d 95, 97-98 (5th Cir. 1989):

> Federal courts have long maintained that a domestic relations exception to federal jurisdiction, founded on "the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts."

Id.

Petitioner fails to present any facts or law supporting his position that his § 1983 action is not inextricably intertwined with the state court's judgment.[2]

The domestic relations exception recognized that discretion in such matters are best left to the discretion of the State trial court. O.C.G.A. §§ 19-9-1 and 19-9-3 provide the Superior Courts of the State of Georgia (and, by extension, Juvenile Courts) with broad discretion in modifying child custody orders to ensure that the best interests of the child are served. In this

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2. Petitioner's recitation of facts in his affidavit and statement of undisputed facts recites Respondent's alleged failure to exercise visitation, the support system available to him and Zachary in Chattanooga, his inability to work full time, etc. These are the identical issues that would be considered in a modification of custody or visitation action and indicate that the District Court would indeed be delving into the realm of State court jurisdiction. In other words, Petitioner shows that this matter is inextricably intertwined with the custody issues involved in the initial custody order and in any modification action that may be brought.

respect, the State courts have a great interest in the best interests of a child and any modification of a State court order by a federal court would, by its very nature, impact every other aspect of that custody order. Based upon the record presented in this petition, if this Court reversed and remanded and the District Court declared ¶ 1(n) of the Custody Order null and void, Petitioner would remove himself from the State of Georgia with Zachary and thereby obliterate the Respondent's entire secondary joint custodial visitation provisions of the Custody Order and Final Judgment and Decree. As a result, Respondent would have no choice but to bring a modification action pursuant to O.C.G.A. §§ 19-9-1 and 19-9-3. Thus, as in *Rogers*:

> In order to supply the requested relief, a federal district court would be required to revisit the factual determination made prior to awarding custody, and if it reached a contrary conclusion to unsettle the basis of the custody and visitation decision reached and affirmed by the [State] courts; in the end, such a result would no doubt prompt a suit by [Respondent] for custody and visitation reconsideration [or modification], thereby encroaching on the apparent state interest in determining custody and risking incompatible federal and state decrees.

Rogers, 891 F.2d at 98. The unavoidable conclusion is that the Petitioner's § 1983 action is inextricably intertwined with custody issues involving Zachary.

Petitioner alleges that his right to interstate travel is being curtailed by the Custody Order. However, nothing is actually prohibiting Petitioner's relocation. If Petitioner does move to Chattanooga, he would be entitled to exactly that which Respondent would be entitled to if the automatic modification provision were declared void. Both parties were awarded joint

legal and physical custody. Rather than appealing the Custody Order, Petitioner ratified it when incorporating it into the Settlement Agreement of the parties. Additionally, the Georgia Supreme Court has already held that self-executing child custody modification provisions are valid where the parents are joint custodians. *Carr v. Carr*, 263 Ga. 451, 435 S.E. 2d 44 (1993).

Petitioner does not in any way show how his procedural due process rights have in any way been infringed. It is undisputed that Petitioner had notice of the August 23, 1993 final hearing on custody in the Gwinnett County Juvenile Court. Thus, Petitioner did have notice and an opportunity to be heard.[3]

Ironically, Petitioner relies on *M.L.B. v. S.L.J.*, __ U.S. __, 117 S. Ct. 555 (1996) to support his position that his procedural due process rights have been denied. In *M.L.B.*, the Petitioner's due process rights were denied due to the fact that she could not appeal the termination of her parental rights due to her indigence. Here, Petitioner did not even try to appeal the order prohibiting the very rights he now claims are being denied.

It is undisputed that Petitioner appeared at a hearing, was represented by counsel and presented evidence and argument. It is also undisputed that Petitioner ratified this Custody Order in his Agreement with Respondent of December 31, 1993 which was incorporated into the Final Judgment and Decree of Divorce on January 3, 1994. Petitioner never moved for reconsideration or to have the Custody Order or Final Judgment and Decree set aside. These are procedures that were available to him. *Bradley*

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3. Petitioner urged below that the focal point of the procedural due process inquiry is on the relief he could be denied in a modification of custody action. However, Petitioner's claim as to impingement of a liberty interest goes directly and solely to the Custody Order entered by the juvenile court after a hearing to which he had notice and an opportunity to be heard.

v. Bradley, 232 Ga. 717, 208 S.E. 2d 817 (1974); *Hathcock v. Hathcock*, 232 Ga. 719, 208 S.E. 2d 819 (1974). Petitioner never moved for a new trial pursuant to O.C.G.A. § 9-11-60. Petitioner never applied for discretionary review of the Custody Order or the Final Judgment and Decree. Ga. Const. 1983, Art. VI, § VI, ¶ III; O.C.G.A. § 5-6-35. Until now, Petitioner never petitioned for a Writ of Certiorari from the United States Supreme Court to challenge the constitutionality of the Custody Order or the Final Judgment and Decree. *Feldman*, 460 U.S. at 482 & n.16, 103 S. Ct. at 1315 & n.16, 75 L. Ed. 2d 206 (1983) (affirming that United States Supreme Court has exclusive federal jurisdiction over review of state court judgments).[4]

Petitioner's argument that he has or will be denied his procedural due process rights is therefore without merit. In any event, he has failed to raise the constitutional issues in accordance with the procedurally provided state court methods.

> [T]here are adequate state remedies to redress the alleged deprivation of a fair hearing . . . . First and foremost is the existence of an opportunity for appellate review of the proceedings. [A constitutional objection to the Custody Order could have been raised] as an enumeration or error in the appeal of [the Custody Order] or the final judgment . . . .
>
> The Supreme Court has held that there has been no deprivation of procedural due process by state action where the state has provided an adequate post-deprivation remedy. *Parrett v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L .Ed. 2d 420 (1980); *Hudson v. Palmer*, __ U.S. __, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). The state remedy need not be identical to, or as extensive as, a remedy for damages

4. Arguably, this ratification constitutes a waiver and estoppel.

> under section 1983, but instead need only be sufficient to satisfy the requirements of procedural due process. . . .

Collins v. Walden, 613 F. Supp. 1306, 1313 (N.D. Ga. 1985).

The *Collins* court goes on to state that

> plaintiff cannot establish a violation of procedural due process if the state has provided an adequate remedy for the alleged deprivation. . . . The fourteenth amendment's due process clause protects only against deprivations of life, liberty, or property *by the state*. *Parratt* teaches that when the state has provided an adequate remedy to redress the alleged deprivation, there has been no deprivation by the state.

Id. at 1318. The burden of showing that the State of Georgia's procedural laws barred the presentation of his constitutional claims is on Petitioner. *Pennzoil*, 107 U.S. at 14. Petitioner's failure to present his federal claim in State court compels the assumption that the State procedures provided adequate remedy, especially where Petitioner cannot argue that he used any available State procedures. *Id.* at 15.

"Because plaintiff was not deprived of procedural due process he cannot state a claim for any denial of substantive due process." *Id.* at 1319 (cites omitted).

As in *Powell*:

> If a federal district court were now to hold in [Petitioner's] favor on his federal claim, that holding would "effectively nullify" the state court's

> judgment. . . . The result would be that the state court's judgment . . . would be collaterally reviewed and reversed in federal court, which is precisely what the Rooker-Feldman doctrine exists to prevent.

Powell, 80 F.3d at 466.

"It is well-established that this court is bound by the same preclusive effect to a judgment by a Georgia court that the judgment would be given in the Georgia courts." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883, 1889, 72 L. Ed. 2d 262 (1982); 28 U.S.C. § 1738. This is true even though the subsequent action is brought under 42 U.S.C. § 1983. *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

III.

ASSUMING FOR PURPOSES OF ARGUMENT THAT THIS COURT FOUND MERIT IN PETITIONER'S POSITION AND REMANDED TO THE DISTRICT COURT, PETITIONER CANNOT MAINTAIN A § 1983 ACTION AGAINST RESPONDENT AS SHE IS NOT A STATE ACTOR.

Even if this Court were to determine that an exception to the "Rooker-Feldman Doctrine" or the domestic relations exception did exist, Petitioner fails to address the fact that this issue is moot. Petitioner does not challenge the District Court's finding that Respondent is not a state actor and that, therefore, a § 1983 action will not stand. Thus, even if this Court were to ultimately reverse and remand on the "Rooker-Feldman Doctrine" issue, the underlying action cannot be pursued against Respondent as she is not, as a matter of law, a state actor. In essence, Petitioner is seeking an advisory opinion from this Court, which is prohibited. *Steel Company v. Citizens for a*

Better Environment, __ U.S. __, 118 S. Ct. 1003, 1016 (1998) (holding that "jurisdiction is always an antecedent question [and that h]ypothetical jurisdiction produces nothing more than a hypothetical judgment — which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.") *See also Pennzoil*, 481 U.S. at 11 (holding that "a constitutional determination . . . predicated on a reading of the statute that is not binding on State courts . . . may be discredited at any time — this essentially rendering the federal-court decision advisory and the litigation underlying meaningless.").

To prevail under 42 U.S.C. § 1983, a plaintiff must show that the

> conduct complained of was committed by a person acting under color of state law . . . [and] that this conduct deprived [him] of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d 420 (1981), *overruled on other grounds*, *Daniel v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

The District Court, in its order, pointed out that the United States Supreme Court

> has established a two-part test for determining whether private "conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

R3-14-7. The District Court then quoted that test:

> "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* A private party
>
> > may only be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from the state officials, or because his conduct is otherwise chargeable to the State.
>
> *Id.* R3-14-7, 8.[5]

The test is to be applied not only to determine whether a defendant acted under color of authority, but also in determining whether there has been a deprivation of a due process right.

> Because the fourteenth amendment is directed at the states, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982). Similarly, section 1983 provides a cause of action only for those deprived of a constitutionally protected right "under color of state law." *Id.* Thus, **a showing of state action is necessary to establish both the deprivation of a fourteenth amendment right and to meet the "under color of" state law requirement of § 1983.**

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5. The District Court assumed for purposes of Summary Judgment that Petitioner had met the first prong of the *Lugar* test.

Bendiburg v. Dempsey, 707 F. Supp. 1318, 1326 (N.D. Ga 1989), *aff'd in part and rev'd in part on other grounds*, 909 F.2d 463 (11th Cir. 1990) (Emphasis supplied) (Cites omitted).

Furthermore, as set forth by the District Court:

> A private party's mere invocation of state legal procedures does not constitute joint participation or conspiracy with state officials satisfying the § 1983 requirement of action under color of law. *Lugar*, 457 U.S. at 939 n.21; *Price v. Hawaii*, 939 F.2d 702, 708 (9th Cir. 1991) (" 'Merely resorting to the courts . . . does not make a party a coconspirator or a joint actor with the judge.' ") (quoting *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), *cert. denied*, 503 U.S. 938 (1992); *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991) ("It is well established that mere recourse to state or local court procedures does not by itself constitute joint activity with the state sufficient to subject a private party to liability under section 1983."), *cert. denied* 503 U.S. 957 (1992). At a minimum, some overt and significant state participation, other than recourse to state court, is required. *Hoai*, 935 F.2d at 313.

Absent a state actor, Petitioner's underlying action will be dismissed, regardless of whether there is an exception to the "Rooker-Feldman Doctrine". As Petitioner has failed to provide even the slightest basis for inquiry into the status of Respondent as a State actor or person acting under color of authority, his claim against Respondent must fail as a matter of law.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied. Thus, the District Court's Judgment and Order of December 10, 1996 must be affirmed.

Respectfully submitted,

DOUGLAS H. PIKE
118 East Trinity Place
Decatur, Georgia 30030
(404) 479-4400

FRED L. CAVALLI
118 East Trinity Place
Decatur, Georgia 30030
(404) 479-4400

Attorneys for Respondent